(2)

No. 94-2103

Supreme Court, U.S.
FILED
JUL 7 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

In Re CHAR YIGH MARINE (PANAMA) S.A.,

Petitioner.

Petition For Writ Of Mandamus/Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS OR IN THE ALTERNATIVE FOR WRIT OF CERTIORARI

DAVID S. PORTER
Counsel of Record
FISHER & PORTER
A Law Corporation
110 Pine Avenue, 11th Floor
Long Beach, California 90802
(310) 435-5626

Attorneys for Respondent Interpool Limited

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

36 pp

QUESTION PRESENTED

Respondent is dissatisfied with the Question Presented by Petitioner. The Question Presented should be as follows:

May Petitioner seek an extraordinary writ from, or alternatively review by, this Court on an issue which was not "pressed or passed upon" in the Ninth Circuit Court of Appeals?

PARTIES TO THE PROCEEDING

Respondent is dissatisfied with the Parties to the Proceeding set forth by Petitioner. The following parties, including parent and/or subsidiary companies under Supreme Court Rule 29.1, have interests in this action:

Interpool Limited

Allianz of America, Inc.:
Fireman's Fund Insurance Company

Royal Group, Inc.:
Royal Insurance Company

Atlas Assurance Company of America:
Albany Insurance Company

St. Paul Companies, Inc.:
St. Paul Fire & Marine Insurance Company

Lumbermen's Mutual Casualty Co.:
American Motorist Insurance Co.

Federal Insurance Company:
Sun Insurance Co. of New York

Nationwide Mutual Insurance Company:
Employers Insurance of Wausau

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

STATUTES 1

I. STATEMENT OF THE CASE 1

II. SUMMARY OF ARGUMENT 4

III. THERE ARE NO PROPER GROUNDS FOR MANDAMUS OR REVIEW 5

IV. THERE IS NO EVIDENCE TO SUPPORT PETITIONER'S THEORY OF A SUBSTITUTE TRUSTEESHIP 7

V. PETITIONER'S MISSTATEMENTS OF FACT AND LW 11

VI. CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Defense Supplies Corp. v. Lawrence Warehouse Co., 336 U.S. 621, 69 S.Ct. 762, 93 L.Ed. 931 (1949) 9

Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., 808 F.2d 697 (9th Cir. 1987), *cert. denied sub nom., Intel Containers International Corp. v. M/V C.C. SAN FRANCISCO*, 484 U.S. 828, 108 S.Ct. 96, 98 L.Ed.2d 58 (1987) 1, 2

Interpool Ltd. v. Char Yigh Marine (Panama) S.A., 890 F.2d 1453 (9th Cir. 1989), *modified*, 918 F.2d 1476 (9th Cir. 1990) 1, 2, 3, 12

State of California v. Taylor, 353 U.S. 553, 77 S.Ct. 1037, 1 L.Ed.2d 1034 (1957) 7

United States ex rel. Acme Granite & Tile Co. v. F.D. Rich Co., 437 F.2d 549 (9th Cir. 1970), *rehearing den.* 441 F.2d 1143 (9th Cir. 1971), *cert. den.*, 404 U.S. 823 (1971) 10

United States v. Williams, 504 U.S. 36, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992) 6

OTHER AUTHORITIES

Fed. R. Civ. Pro. § 17(b) 1, 11

Fed. R. Civ. Pro. § 25(c) ..... *passim*

Local Rules of the Central District of California, Rule 7.3.3 ..... 1, 8

Supreme Court Rule 10 5

Supreme Court Rule 15.1 11

Supreme Court Rule 20.1 6

STATUTES

The following statutes and rules are relied upon herein by Respondent, and are set forth in full in Appendix 1:

Fed. R. Civ. Pro. § 25(c)

Fed. R. Civ. Pro. § 17(b)

Local Rules of the Central District of California, § 7.3.3

I. STATEMENT OF THE CASE

Respondent Interpool Limited brought suit against a series of interwoven foreign shipping companies operating collectively as "C.C. Line." The suit alleged a series of breaches of shipping container (and related equipment) lease agreements, and sought millions of dollars in damages. *Interpool Ltd. v. Char Yigh Marine (Panama) S.A.*, 890 F.2d 1453 (9th Cir. 1989), *modified*, 918 F.2d 1476 (9th Cir. 1990). Other creditors followed with similar actions. *See, Foss Launch & Tug Co. v. Char Ching Shipping U.S.A.*, 808 F.2d 697 (9th Cir. 1987), *cert. denied sub nom., Itel Containers International Corp. v. M/V C.C. SAN FRANCISCO*, 484 U.S. 828, 108 S.Ct. 96, 98 L.Ed.2d 58 (1987).

Faced with these suits and other creditor claims, C.C. Line then for all intents and purposes vanished, taking with it any remaining assets, never to appear in this or any other creditor actions. It left behind a bevy of creditors in the United States seeking to find and seize any remaining assets of C.C. Line to salvage something from their multi-million dollar losses.

C.C. Line's one known asset was a container ship, the C.C. SAN FRANCISCO, which was on its way to the Port of Long Beach. Upon arrival, the vessel became the subject of a vicious scramble among C.C. Line's creditors, including Respondent. The vessel variously was arrested and attached in the creditor actions. *Interpool*, 890 F.2d at 1455; *Foss Launch & Tug*, 808 F.2d at 698.

Another C.C. Line creditor which was scrambling for the C.C. SAN FRANCISCO was the ship financing lender, Petitioner Char Yigh Marine (Panama) S.A., a corporation organized and formed under the laws of Panama by a Hong Kong ship financing concern, SB General Leasing (Hong Kong) Co., Ltd. In order to deprive the other creditors, including Respondent, of any claims to the vessel, and to seize possession of the asset and whisk it away to the Orient before a creditor feeding frenzy could take place, Petitioner appeared in the district court and represented that it was the *owner* of the vessel, and not merely a creditor. Petitioner therefore asserted that it was entitled to immediate and unfettered possession of the vessel, and that no other creditors could assert claims against the vessel as an asset of C.C. Line. *Interpool*, 890 F.2d at 1456. As the court of appeals subsequently held, Petitioner's ownership claim was wrong; indeed, as Respondent had contended, the vessel was an asset of C.C. Line which was subject to attachment. *Interpool*, 890 F.2d at 1460-61.

But that was only the beginning of the complications in this case, for well before that appeal the vessel had been released to Petitioner by order of the district court. Petitioner had removed the vessel to Japan and sold it. Petitioner thereafter had dissolved as a corporation in

1986, leaving no apparent assets. *Interpool*, 890 F.2d at 1456-57. Thus, even though Petitioner was not the owner of the vessel, it succeeded in spiriting the vessel away from the district court and depriving creditors of C.C. Line, including Respondent, of the right to salvage any of their losses from the last remaining C.C. Line asset.

The one marginally saving grace is that the district court initially ordered Petitioner to post a $1 million bond in favor of Respondent in order to secure the release of the vessel. The bond stipulated that it would cover up to $1 million, plus interest and costs, of any *in personam* judgment Respondent could obtain against the C.C. Line entities, provided Respondent subsequently could establish that the C.C. Line entities had an attachable interest in the vessel. *Interpool*, 890 F.2d at 1456.[1]

Once the court of appeals decided in 1989 that the vessel indeed was a C.C. Line asset, and thus was subject to attachment for claims against C.C. Line, the case was remanded for "full consideration of whether Interpool possesses such a right [to attach the vessel.]" *Interpool*, 890 F.2d at 1461. Upon remand, the district court heard a series of motions, the ultimate findings of which showed that Respondent had established a right to attach the vessel, had met the conditions for recovery under the bond, and was entitled to a judgment against Petitioner under the terms of the bond stipulation in the sum of $1 million plus costs. Prejudgment interest was denied.

---

[1] The bond alternatively covered any *in rem* liability of the vessel. That liability is not at issue in this case.

The court of appeals subsequently affirmed the underlying judgment, but remanded on the interest issue, finding that prejudgment interest normally is awarded as a matter of course in cases such as this. Petitioner then filed two motions for reconsideration with the court of appeals. It was not until Petitioner's first motion for reconsideration that it raised any Fed. R. Civ. Pro. § 25(c) issue in this 11-year-old case, which issue now forms the basis for its Petition. In a Memorandum[2], which is the subject of this Petition, the court of appeals deemed the issue waived and rejected consideration of the merits of the argument. (Memorandum filed March 8, 1995, Appendix A to Petition.)

II. SUMMARY OF ARGUMENT

Petitioner seeks mandamus relief or review by this Court based on the issue of the application of Fed. R. Civ. Pro. § 25(c) to the facts of this case.[3] The issue was raised by Petitioner for the first time in this case in a motion for

---

[2] Under Circuit Rule 36-1, a written, reasoned disposition of a case which is not intended for publication is a "MEMORANDUM."

[3] The Petition states the "QUESTION PRESENTED" as follows:

> May the Ninth Circuit Court of Appeals ignore Federal Rule of Civil Procedure 25(c), its own published precedent on that Rule, and its own published 1990 decision in the present case, and sustain a 1992 District Court judgment of $1 million against Char Yigh Marine (Panama) S.A. on the grounds that Char Yigh lacks capacity to protect itself by reason of a corporate dissolution during litigation?

reconsideration filed with the court of appeals after the court already had affirmed the underlying judgment against Petitioner. The court of appeals, in reviewing the matters raised in the motion for reconsideration, noted that the Rule 25(c) argument had not been raised previously in the case or on appeal, and expressly held that the issue was waived:

> Char Yigh's failure in its earlier submissions to predicate an argument, or to file a motion based on Fed. R. Civ. Pro. § 25(c) constitutes a waiver of any such claim.

(Petitioner's Appendix A, p. A4, n. 2.)

Since the issue raised in this Petition was not "pressed or passed upon" in the court of appeals, and instead was deemed waived, the well-established precedent is that this Court will not recognize the issue.[4] Mandamus relief and/or certiorari therefore should be denied on the question presented in the Petition.

III. THERE ARE NO PROPER GROUNDS FOR MANDAMUS OR REVIEW

This case is not appropriate for review by this Court. First, the question presented was not "pressed or passed upon" by the court of appeals. Second, the question presented does not meet any of the criteria for review under the considerations stated in Supreme Court Rule 10.

---

[4] The only issue which was "pressed or passed upon" by the Court of Appeals with respect to Rule 25(c) was whether Petitioner's argument was properly deemed waived, a question which Petitioner has not presented here.

There are no conflicts of Circuit or Supreme Court authority, and no important questions of federal law which have not been settled by this Court.

There furthermore are no grounds for a writ of mandamus to issue under Supreme Court Rule 20.1. There is nothing in the Petition which shows that a writ will aid this Court's appellate jurisdiction in this case, that there are any exceptional circumstances warranting the exercise of this Court's discretionary powers, or that adequate relief cannot be obtained in any other form or from any other court. Indeed, the very fact that Petitioner seeks an alternative writ of certiorari to address the issues raised in its mandamus request demonstrates that an alternative to a writ of mandamus exists. Thus, the mandamus petition should be dismissed summarily.

As noted in Part II above, Petitioner's Fed. R. Civ. Pro. § 25(c) argument, which is the exclusive issue presented in its alternative petition for certiorari, was raised for the first time in this 11-year-old case in Petitioner's motion for reconsideration filed with the court of appeals. The court of appeals rejected the argument as untimely, and expressly held that the issue was waived. (Petitioner's Appendix A, p. A4, n. 2.)

The traditional rule precludes a grant of certiorari when "the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 40, 112 S.Ct. 1735, 1738, 118 L.Ed.2d 352 (1992). It is difficult to fathom how Petitioner can now ask this Court to issue a writ of mandamus or to review an issue which was never properly or timely raised in the Court below, and which was therefore not considered because it was deemed

waived by the court of appeals. *State of California v. Taylor*, 353 U.S. 553, 556, n. 2, 77 S.Ct. 1037, 1 L.Ed.2d 1034 (1957).

In this case, the issue of the application of Fed. R. Civ. Pro. § 25(c) was waived, and therefore was neither pressed nor passed upon by the court of appeals. Therefore, the issue should not be recognized by this Court, and review should be denied.

IV. THERE IS NO EVIDENCE TO SUPPORT PETITIONER'S THEORY OF A SUBSTITUTE TRUSTEESHIP

Substantively, there is no evidence in the record against which a Rule 25(c) analysis could be applied. Counsel for Petitioner conceded at the November 22, 1991 hearing on this matter in the district court that Petitioner was a dissolved Panamanian corporation, and that Panamanian law only allows for the continuance of defense of a dissolved corporation for a period of *three years*. Counsel further conceded that Petitioner's right to continue its defense expired in 1989. (See, Appendix 2 hereto, Transcript of November 22, 1991 Hearing, p. 23, l. 7 – p. 24, l. 11, CR 249.) Notwithstanding that under Panamanian law Petitioner no longer had a right to defend this action, counsel for Petitioner urged at the November 22, 1991 hearing that unidentified and undisclosed "trustees" had the right to continue with this action. (Appendix 2, Transcript of November 22, 1991 Hearing, p. 24 l. 10 – p. 25, l. 4.) Counsel provided no factual or legal basis for such a substitute corporate trusteeship, and no authority for the proposition that any such alleged "trustees" could

continue to represent Petitioner's purported interests in this litigation. The district court therefore questioned Petitioner's right to be represented in the litigation. (Appendix 2, transcript of November 22, 1991 Hearing, p. 25, ll. 5-13.) Petitioner then requested "two weeks to consider what position has to be made" with respect to the issue of whether the trustees would or could appear in this action to represent Petitioner. (Appendix 2, Transcript of November 22, 1991 Hearing, p. 24, l. 21 – p. 25, l. 4.)

Petitioner failed to comply with the district court's order to produce the requested authority and evidence within two weeks, and therefore was held to have no legal capacity since the record established it lacked any capacity to proceed. (See, Appendix 3 hereto, Transcript of January 13, 1992 Proceedings, p. 9, l. 7 – p. 17, l. 3, CR 274.) The district court rightfully refused to accept evidence which was proffered for the first time at the motion hearing, when the original submission date for such evidence had long passed. Local Rules of the Central District of California, Rule 7.3.3.[5]

Based on the evidentiary and legal record, as well as Petitioner's admissions, Petitioner ceased to have any ability under Panamanian law to prosecute or defend this action after 1989. It follows that without legal capacity, Petitioner could not further defend the underlying action and cannot now prosecute this Petition.

---

[5] Petitioner did not appeal the District Court's striking of late filed evidence, and any such attempted submissions are not part of the record.

Fed. R. Civ. Pro. § 25(c) provides:

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

The record is devoid in this case of any evidence or authority that any actual, lawful transfer of interest from Petitioner to "trustees" or anyone else actually took place. That alone precludes any further consideration of a Rule 25(c) transfer of interest in this case.

It is true that "a time-honored feature of the corporate device is that a corporate entity may be utterly dead for most purposes, yet have enough life remaining to litigate its actions. All that is necessary is a *statute* so providing." *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 621, 634-35, 69 S.Ct. 762, 93 L.Ed. 931 (1949) [Emphasis added.]

Putting aside the facts that the issue was not "pressed or passed upon" in the court of appeals and that the record is devoid of any evidence of an actual transfer of interest, the initial element lacking in this case for the application of Rule 25(c) is the absence of any evidence of *statutory* authority that would enable Petitioner to prosecute or defend this action beyond three years after Petitioner's dissolution. In this case, as noted above, counsel for Petitioner represented that Panamanian law provides that a dissolved Panamanian corporation may continue to prosecute and defend actions for a period of three years after dissolution. There is no evidence in the record that

this three-year period may be extended under Panamanian law, or that "trustees" may be substituted in place of the dissolved corporation at the end of the three year period. Thus, under the applicable Panamanian statutory grant of authority, Petitioner could not continue to prosecute or defend any aspect of this case at the expiration of the three year period. Absent a statutory grant of authority to continue or to transfer an interest to unnamed and undisclosed "trustees," Rule 25(c) has no application.

It is telling that even Petitioner's identification of the Parties to the Proceedings contained in its Petition only includes Petitioner Char Yigh Marine (Panama) S.A. ("Char Yigh") and SB General Leasing (Hong Kong) Co., Ltd. Nothing is mentioned about any purported "trustees" of or successors to Char Yigh. Without any timely appearance by a named successor to Petitioner, cases such as *United States ex rel. Acme Granite & Tile Co. v. F.D. Rich Co.*, 437 F.2d 549, 552 (9th Cir. 1970), *rehearing den.* 441 F.2d 1143 (9th Cir. 1971), *cert. den.*, 404 U.S. 823 (1971), have no application.[6]

---

[6] Petitioner grossly mischaracterizes the facts and holding in *Acme Granite*. The case does *not* stand for the proposition that "a dissolved defendant should always be allowed to substitute in its successor, if at all feasible." Petition, p. 19. To the contrary, the court of appeals held that substitution under Rule 25(c) was within the discretionary powers of the court. However, under the peculiar facts of the case, where the corporate dissolution was inadvertent and shareholders of the dissolved corporation sought timely relief to substitute in as parties, the Court of Appeals reluctantly concluded that denial of the substitution was an abuse of discretion on the part of the District Court. 427 F.2d at 552. Here, the dissolution was not inadvertent, there were no identified "trustees" or other parties who timely sought

In all events, Fed. R. Civ. Pro. § 25(c) does not apply to this case. Since Petitioner attempted to file its "Involuntary Third-Party Claim" (Appendix E to Petition) on January 10, 1992, which claim purportedly would have given Petitioner capacity to challenge Respondent's rights under the bond, that proceeding would have been filed long after the three-year expiration of corporate authority under Panamanian law. Thus, since the attempted "Involuntary Third-Party Claim" effectively would have been a new proceeding, Fed. R. Civ. Pro. § 17(b), and not § 25(c), would have applied to Petitioner's challenge to the bond recovery.

V. PETITIONER'S MISSTATEMENTS OF FACT AND LAW

Pursuant to Supreme Court Rule 15.1, and in addition to those items addressed above, Respondent wishes to point out the following material misstatements of fact and law contained in Petitioner's brief:

1. The $1 million bond security which was posted on behalf of Petitioner was to stand in the place and stead of the vessel "C.C. SAN FRANCISCO." Respondent claimed the vessel was an attachable asset of defendant

---

to be substituted, and there is no evidence in the record that Panamanian law would allow such a substitution or continuation of a defense beyond three years. There simply are no grounds for concluding that the district court abused any discretion, or that the court of appeals wrongly affirmed the district court's actions.

C.C. Line. Petitioner denied this point, and obtained custody of the vessel from the district court based on Petitioner's ownership representations with respect to the vessel. Petitioner was required to post the $1 million bond to secure Respondent in the event the vessel subsequently was held to be an attachable asset of C.C. Line. Respondent's position with respect to ownership and attachment ultimately were validated by the court of appeals in *Interpool*, 890 F.2d 1453. Thus, the judgment for $1 million in this case against Petitioner was based not on any direct liability to Respondent, but instead was based on the fact that Petitioner had taken custody of a vessel from the district court which should have been available to Respondent as an attachable asset of Respondent's debtor, C.C. Line. In the absence of the vessel to satisfy Respondent's claim, judgment was rendered based on the bond security which had been posted by Petitioner to secure the release of a vessel. Any references by Petitioner to a judgment being entered against it as a dismissed party wrongly implies that a judgment was rendered against a party over which the district court had no jurisdiction. This is not true; jurisdiction for the judgment against Petitioner existed because it voluntarily appeared in the action and obtained custody of the vessel under an ownership claim, and because of the terms of the stipulated security which granted custody of the vessel to Petitioner.

2. Petitioner dissolved in 1986. At the time the appeal in *Interpool v. Char Yigh* was pending in the court of appeals, the three-year period for Petitioner to continue litigation had not expired. Therefore, the court of appeals' reference to Petitioner's capacity was a correct

statement of law at the relevant time. This did not mean, however, that the statutory three-year period under Panamanian law was extended by the court of appeals' opinion.

3. Petitioner's reference to an unrelated action, *Crescent Wharf & Warehouse Co., etc. v. The vessel C.C. SAN FRANCISCO*, District Court Case No. 84-6287 KN, is irrelevant. That case was not part of the record below. In all events, in reviewing Appendix G to the Petition, it is clear that the capacity issue was raised by plaintiffs in that case late into those proceedings. Further, it is unclear what evidence was or was not submitted to support the capacity argument. Respondent and the district court here could only deal with the facts, law, and evidence presented in this action. In this case, as detailed above, Petitioner failed to submit in a timely manner as ordered by the district court any evidence that the statutory three-year period was extended under Panamanian law, that "trustees" existed who were empowered to continue with litigation on behalf of Petitioner, or that Panamanian law authorized such a transfer of interest.

4. Petitioner's merger by judgment argument is a red-herring and is not part of the Question Presented by Petitioner. Respondent presented to the district court evidence conclusively establishing that there was a clear separation of actions, and that in all events the C.C. Line entities waived any such defense. At the time the Confession of Judgment originally was given, the damages for lost or unreturned equipment had not been incurred and could not form the basis for suit. It is disingenuous for Petitioner to argue that the limited Confession of Judgment somehow bars this action because the law does not

require a contracting party to treat each default as a material breach and to terminate the agreement. Proper set-offs were given in the default judgment for the prior Confession of Judgment, and the district court correctly determined there was no overlapping or duplicate recovery.

VI. CONCLUSION

There were no Fed. R. Civ. Pro. § 25(c) arguments raised in the entire eleven-year history of this case until Petitioner's motion for reconsideration was filed with the court of appeals. The court of appeals properly deemed the issue waived. The issue, therefore, was not "pressed or passed upon" by the Court below, and should not be recognized by this Court.

Substantively, there is no basis for mandamus or a writ of certiorari to issue in this case. The underlying record establishes that Petitioner's statutory grant of authority to prosecute and defend actions expired after three years, and that no provision was made for any substitute parties, including any non-disclosed and non-appearing "trustees," to appear and represent Petitioner's interests in this case. Putting the waiver issue aside, there simply is nothing in the record from which this Court could determine that Rule 25(c) has any application to this case.

The rulings of the district court and the court of appeals were consistent with the facts of record and established precedent. There are no conflicts of authority, and no important questions of federal law at issue. The

Petition for Writ of Mandamus or in the Alternative for Writ of Certiorari should be denied.

Dated: July 7, 1995

DAVID S. PORTER
FISHER & PORTER
A Law Corporation

DAVID S. PORTER
Attorneys for Respondent
Interpool Limited

APPENDIX 1

Fed. R. Civ. Pro. § 25(c):

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

Fed. R. Civ. Pro. § 17(b):

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a).

Local Rules of the Central District of California, § 7.3.3:

> A party filing any document in support of, or in opposition to, any motion noticed for hearing as above provided after the time for filing the same

shall have expired, shall be subject to the sanction of Local Rule 27 and the F.R.Civ.P. Additionally, the Court may strike the filing of any such late document and disregard it for all purposes.

APPENDIX 2

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE IRVING HILL, JUDGE PRESIDING

INTERPOOL, LTD. PLAINTIFF, VS. CHAR CHING MARINE (H.K.) COMPANY, LTD., ET AL. DEFENDANTS.	)	CV 84-6333-IH CERTIFIED COPY

TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

NOVEMBER 22, 1991

CANDEE MARSH
OFFICIAL COURT REPORTER
432 U.S. COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CA. 90012
(213) 625-2881

[p. 23] * * *

SOMETHING IN THE PAPERS LEADS ME TO BELIEVE THAT CHAR YIGH IS NOT EVEN AN EXISTING ENTITY AT THIS TIME. FOOTNOTE SIX IN THE NINTH CIRCUIT OPINION BACK IN 1989 ASSERTS

THAT CHAR YIGH AS OF THAT TIME WAS DISSOLVED. THE CIRCUIT SAYS THAT SINCE CHAR YIGH WAS A PANAMANIAN CORPORATION, UNDER PANAMANIAN LAW A DISSOLVED CORPORATION CAN CONTINUE TO DEFEND LITIGATION.

QUERY, IF A DISSOLVED PANAMANIAN CORPORATION CAN HAVE ANY STANDING OR STATUS NOT IN DEFENDING LITIGATION BUT IN ASSERTING THIRD PARY ATTACHMENT RIGHTS – BEFORE YOU REPOND, I WANT TO NOTE ON THE RECORD THAT IN 1986 IN FRONT OF JUDGE CURTIS, IN A PAPER CALLED "RESPONSE TO ORDER TO SHOW CAUSE," WHICH WAS FILED FEBRUARY 19, 1986, CHAR YIGH STATED FLATLY, THAT UNDER PANAMANIAN LAW ITS RIGHT TO DEFEND LITIGATION WOULD EXPIRE WITHIN THREE YEARS FROM THE DATE OF ITS DISSOLUTION. YOU WILL FIND THAT IN PLAINTIFF'S EXHIBIT C ON ITS POINTS AND AUTHORITIES IN THIS PROCEEDING.

THREE YEARS ARE GONE. SO WHERE ARE WE, SIR, UNDER THAT SITUATION?

[p. 24] MR. WOOLEY: I AM NOT PRECISELY CERTAIN. I BELIEVE, HOWEVER, THAT PANAMANIAN LAW ALLOWS THE TRUSTEES OF THE DISSOLVED CORPORATION TO CONTINUE TO PROSECUTE LITIGATION AFTER –

THE COURT: I DON'T HAVE THE TRUSTEES IN FRONT OF ME. I HAVE CHAR YIGH; CORRECT?

MR. WOOLLEY: CORRECT, YOUR HONOR.

THE COURT: OKAY. AND ON YOUR OWN STATEMENT, CHAR YIGH'S STATUS TO DEFEND AN ACTION ENDED IN '89; RIGHT?

MR. WOOLLEY: THAT WAS THE SITUATION WHEN I MADE THAT STATEMENT. I BELIEVE IT HAS BEEN REPLACED BY THE TRUSTEES FOR CHAR YIGH THAT THAT IS ONE OF THE POINTS –

THE COURT: WHAT HAS BEEN REPLACED?

MR. WOOLLEY: CHAR YIGH –

THE COURT: THE TRUSTEES ARE NOT A PARTY.

MR. WOOLLEY: THE TRUSTEES HAVE NOT BEEN SUED. THE TRUSTEES ARE ENTITLED.

THE COURT: OKAY. BUT THEY ARE CERTAINLY NOT A PARTY HERE.

MR. WOOLLEY: CORRECT.

THE COURT: SO YOU'RE TELLING ME THAT CERTAIN PEOPLE WHO ARE TRUSTEES MAY HAVE SOME RIGHT TO SOMETHING THAT IS IRRELEVANT TO ME. I DO NOT HAVE ANY SUCH TRUSTEES IN FRONT OF ME.

MR. WOOLLEY: CORRECT. THAT IS ONE OF THE REASONS [p. 25] THAT I ASKED FOR TWO WEEKS TO CONSIDER WHAT POSITION HAS TO BE MADE.

THE COURT: VERY WELL. GO AHEAD. HAVE A SEAT, I MEAN.

YOU KNOW THIS SITUATION ABOUT CHAR YIGH'S DISSOLUTION, NON-EXISTENCE AS AN

ENTITY AND THE EXPIRATION OF A SELF-ADMITTED THREE-YEAR PERIOD TO DEFEND LITIGATION, IN MY VIEW, BECOMES ANOTHER AND SEPARATE BASIS BEYOND THOSE I HAVE ALREADY DISCUSSED AND USED FOR GRANTING PLAINTIFF'S MOTION TO DISMISS CHAR YIGH AS A DEFENDANT.

AND UNDER THAT VIEW OF THE LAW, CHAR YIGH SIMPLY HAS NO RIGHT TO DEFEND ANY MORE. SO AS YOU CAN SEE THAT IS MY TENTATIVE VIEW WITH RESPECT TO MOTION NUMBER TWO, TO GRANT IT.

* * *

APPENDIX 3

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE IRVING HILL, JUDGE PRESIDING

INTERPOOL, LTD.	)	
PLAINTIFF,	)	CV 84-6333-IH
VS.	)	CERTIFIED
CHAR CHING MARINE (H.K.) COMPANY, LTD., ET AL.	)	COPY
DEFENDANTS.	)	

TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

JANUARY 13, 1992

CANDEE MARSH
OFFICIAL COURT REPORTER
432 U.S. COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CA. 90012
(213) 625-2881

* * *

[p. 9] I NOW WANT TO DISCUSS IN MORE DETAIL THE MATTER OF CHAR YIGH'S STATUS OR CAPACITY. I WISH TO INCORPORATE BY REFERENCE TODAY A TELEPHONE CONVERSATION ON THE RECORD AND REPORTED DEALING WITH THE SUBJECT OF CHAR YIGH'S STATUS TO CONTINUE TO PROSECUTE THIS ACTION OR TO DEFEND IT IN ANY CAPACITY.

AS YOU KNOW, AS YOU BOTH PARTICIPATED IN THAT TELEPHONE CONFERENCE THAT OCCURRED TUESDAY, THE 7TH OF JANUARY, A WEEK AGO TOMORROW. THERE IS A TRANSCRIPT ON FILE NOW OF THAT SESSION, SO I WILL NOT REPEAT THE STATEMENTS THE COURT MADE AT THAT TIME.

I WILL SUMMARIZE THEM ONLY TO THIS EXTENT. BASED ON OBJECTIONS OF THE PLAINTIFF TO MY CONSIDERING ANY OPPOSITION TO ITS SUMMARY JUDGMENT MOTION ON THE PART OF CHAR YIGH, AND BASED ON EARLIER DISCUSSIONS OF THE MATTER OF CHAR YIGH'S PRESENT STATUS, WHICH ARE ALSO PART OF THE FILE, I EXPRESSED GREAT RESERVATION ABOUT WHETHER CHAR YIGH CAN CONTINUE TO PARTICIPATE IN THIS CASE, EVEN AS A THIRD-PARTY CLAIMANT, OR TO ANY EXTENT IN ANY CAPACITY.

[p. 10] I CALLED TO THE ATTENTION OF COUNSEL CONCESSIONS ON THE PART OF CHAR YIGH'S COUNSEL SOME TIME AGO, BUT ON THE RECORD, PART OF THE FILE, THAT CHAR YIGH WAS DISSOLVED BACK IN '85, AND UNDER PANAMANIAN LAW ITS AUTHORITY TO CONTINUE PROSECUTING OR DEFENDING LITIGATION ENDED THREE YEARS LATER. THAT MATTER, FACTUALLY, WAS CONCEDED BY CHAR YIGH'S COUNSEL.

SO I TENTATIVELY PROPOSED, AS REQUESTED BY PLAINTIFF, TO STRIKE CHAR YIGH'S OPPOSITION BASED ON THOSE CONCESSIONS. AND I PROPOSED TENTATIVELY TO DECLARE THAT CHAR YIGH HAS

NO FURTHER STATUS, STANDING OR CAPACITY, TO CONTINUE IN THIS LITIGATION IN ANY WAY.

I THINK IN ORDER TO BE COMPLETE, I OUGHT TO STATE THAT THIS VERY MORNING, WITHOUT ANY LEAVE OF COURT, CHAR YIGH HAS FILED SOME PAPERS ON THE SUBJECT OF ITS CAPACITY, WHICH PAPERS I CANNOT SAY I HAVE READ BECAUSE THEY WERE JUST FILED TODAY AND I HAVE HAD AN EXTENSIVE MOTION CALENDAR TO ATTEND TO.

TO LIST THEM, WE HAVE CHAR YIGH'S INTERIM MEMORANDUM CONCERNING CAPACITY: OPINION OF MORGAN & MORGAN ON PANAMANIAN LAW. AND WE HAVE CHAR YIGH'S INTERIM MEMORANDUM CONCERNING CAPACITY – OH, THAT'S THE SAME DOCUMENT. I SEE. JUST AN ORIGINAL AND COPY.

IT APPEARS THAT THE OTHER PAPERS ALONG THIS LINE WERE FILED FRIDAY AFTERNOON, BUT I MUST TELL YOU THAT THAT WAS NOT KNOWN TO ME, AND ALTHOUGH I WAS HERE FOR QUITE A LONG TIME ON [p. 11] FRIDAY AFTERNOON, AT LEAST UNTIL 4:00, THESE PAPERS, AS FAR AS I KNOW, WERE NOT BROUGHT TO CHAMBERS OR BROUGHT TO MY ATTENTION.

THE PAPERS FILED FRIDAY AFTERNOON ARE ENTITLED "CHAR YIGH'S INTERIM MEMO RE CAPACITY." THAT'S ONE OF THEM. AND THE OTHER IS ENTITLED "INVOLUNTARY THIRD-PARTY CLAIM OF CHAR YIGH IN THE VESSEL SAN FRANCISCO OR

MORE PROPERLY A CLAIM OF INTERVENTION AS OF RIGHT."

MR. PORTER, WE'RE DEALING NOW THEN WITH, LET'S SEE, THREE DIFFERENT DOCUMENTS. COME TO THE PODIUM. YOU HAVE SEEN THEM ALL?

MR. PORTER: NO, I HAVEN'T, YOUR HONOR. THE ONLY ONE THAT –

THE COURT: HOW COME?

MR. PORTER: I DON'T KNOW.

THE COURT: WHICH ONES, IF ANY, HAVE YOU SEEN?

MR. PORTER: THIS MORNING BEFORE THE PROCEEDINGS, MR. WOOLLEY HANDED ME CHAR YIGH'S INTERIM MEMORANDUM CONCERNING CAPACITY OPINION OF MORGAN & MORGAN ON PANAMANIAN LAW.

THE COURT: THAT'S THE ONE THAT WAS FILED TODAY.

MR. PORTER: I DID NOT RECEIVE OR I HAVE NOT SEEN THE INVOLUNTARY THIRD-PARTY CLAIM DOCUMENT.

THE COURT: MR. WOOLLEY, CAN YOU EXPLAIN THAT?

MR. WOOLLEY: I DO NOT KNOW WHY MR. PORTER HAS NOT [p. 12] SEEN THE DOCUMENT FILED ON FRIDAY. I DO KNOW WHY I ALREADY FILED THE DOCUMENT AS TO MORGAN & MORGAN TODAY.

THE COURT: NO. I'M ASKING YOU TO EXPLAIN IF YOU CAN WHY A COPY OF THE FRIDAY-FILED DOCUMENT WAS NOT EARLIER MADE AVAILABLE TO HIM?

MR. WOOLLEY: IT WAS.

THE COURT: DID YOU SEND IT IN THE MAIL?

MR. WOOLLEY: PROBABLY, YOUR HONOR. I DO NOT KNOW.

THE COURT: WELL, THAT'S NOT A WAY YOU DEAL WITH OPPOSING COUNSEL ON DOCUMENTS YOU EXPECT OR HOPE WILL BE CONSIDERED FIRST THING MONDAY MORNING.

MR. WOOLLEY: THE FIRST –

THE COURT: HAVE YOU EVER HEARD OF FAXING OR MESSENGERS?

MR. WOOLLEY: YES, YOUR HONOR, I HAVE.

THE COURT: IS THAT NOR ELEMENTAL COURTESY, WHICH YOU WOULD EXPECT IF YOU WERE IN THE SHOES OF THE OTHER SIDE?

MR. WOOLLEY: STANDING HERE, YOUR HONOR, I ENTIRELY AGREE WITH YOU. I DO NOT KNOW WHY THAT WAS NOT DONE. I DO NOT KNOW THAT IT WAS NOT DONE.

THE COURT: WELL, IT'S OBVIOUS THAT IT WASN'T DONE BECAUSE MR. PORTER SAID HE HADN'T RECEIVED ANY SUCH AND YOU HAVE NO PROOF THAT IT WAS DONE; RIGHT?

MR. WOOLLEY: I DO NOT.

THE COURT: OKAY. WELL, HAVE A SEAT.

[p. 13] MR. PORTER, WHAT DO YOU WANT TO DO ABOUT THESE? IN MY VIEW, THEY ARE FILED MUCH TOO LATE WITHOUT ANY AUTHORITY FOR THEM TO BE FILED, AND I WOULD LIKE TO HEAR YOUR VIEW ABOUT IT AND WHAT YOU EXPECT THE COURT TO DO ABOUT THESE DOCUMENTS. I'LL GIVE YOU A FEW MINUTES TO LOOK AT THE ONES YOU HAVEN'T SEEN, IF YOU'D LIKE.

MR. PORTER: IT WOULD BE HELPFUL, YOUR HONOR.

THE COURT: ALL RIGHT. I'LL GIVE YOU NOW MY COPIES – PLEASE RETURN THEM TO THE CLERK – OF THE TWO JANUARY 10 FILINGS.

FIVE MINUTES OR AS SOON AS YOU CAN. LET THE CLERK KNOW YOU'RE READY.

THE BAILIFF: PLEASE RISE. COURT IS IN TEN MINUTE RECESS.

(RECESS TAKEN FROM 11:42 A.M. UNTIL 11:45 A.M.)

THE COURT: MR. PORTER.

MR. PORTER: THANK YOU, YOUR HONOR. AS TO THE INTERIM MEMORANDUM CONCERNING CAPACITY, WHICH APPARENTLY IS DUPLICATIVE OF THE DOCUMENT THAT WAS FILED THIS MORNING, WE WOULD SIMPLY NOTE –

THE COURT: WAIT JUST ONE SECOND. IT'S NOT THE SAME BECAUSE IT HAS NO PANAMANIAN LAWYER'S OPINION ATTACHED TO IT.

MR. PORTER: THAT'S CORRECT. BUT THE BRIEF ITSELF.

THE COURT: THE ARGUMENT IS WHAT YOU'RE SAYING?

MR. PORTER: THAT'S CORRECT. OUR OBJECTION TO THIS [p. 14] DOCUMENT, YOUR HONOR, IS THAT THERE HAS BEEN NO PROPER AUTHENTICATION OF THE MORGAN & MORGAN LETTER.

THE COURT: IT'S NOT UNDER OATH EITHER?

MR. PORTER: NO. THERE SIMPLY IS NO PROPER EVIDENCE OF PANAMANIAN LAW THAT HAS BEEN PRESENTED WITH RESPECT TO THIS DOCUMENT.

THE COURT: WHAT ELSE DO YOU HAVE TO SAY ABOUT ALL THREE DOCUMENTS?

MR. PORTER: WELL, WE WOULD ALSO NOTE WITH RESPECT TO THIS INTERIM MEMORANDUM, YOUR HONOR, THAT BECAUSE WE HAVE RECEIVED IT SO LATE, WE HAVE NOT HAD THE OPPORTUNITY TO REVIEW THE ALLEGATIONS OF PANAMANIAN LAW TO DETERMINE WHETHER THESE ARE TRUE AND CORRECT.

THE COURT: WHAT ARE YOU SAYING? THAT I SHOULD STRIKE THEM AS BEING WITHOUT AUTHORITY AND FILED TOO LATE?

MR. PORTER: YES, YOUR HONOR.

THE COURT: WHAT ABOUT THE OTHER DOCUMENT CALLED "INVOLUNTARY THIRD-PARTY CLAIM," ET CETERA?

MR. PORTER: YOUR HONOR, WE WOULD OBJECT TO THAT AS BEING WOEFULLY TOO LATE. THAT IS SIMPLY A REITERATION OF CHAR YIGH'S POINTS THAT THEY HAVE BEEN MAKING THROUGHOUT THIS LITIGATION – THAT THEY ARE THE OWNER OF THE VESSEL, THAT THEY ARE ENTITLED TO AN OWNERSHIP INTEREST, AND IN THE ALTERNATIVE, A THIRD-PARTY CLAIM INTEREST.

IT IS NOTHING NEW AS TO CHAR YIGH'S POSITION. IT'S [p. 15] SIMPLY THE FIRST TIME CHAR YIGH IN WRITING HAS ALLEGED TO BE MAKING A THIRD-PARTY CLAIM, THOUGH THROUGHOUT THESE PROCEEDINGS WE HAVE BEEN ALLEGING THAT THAT'S EXACTLY THE CAPACITY CHAR YIGH HAS BEEN STANDING IN.

SO WE WOULD MOVE TO STRIKE THAT DOCUMENT ON THE BASIS THAT IT DOESN'T ADD ANYTHING TO THE LITIGATION AND IS CERTAINLY SOMETHING THAT SHOULD HAVE BEEN FILED YEARS AGO.

THE COURT: ALL RIGHT, MR. WOOLLEY. DO YOU WANT TO BE HEARD ABOUT THESE PROPOSALS TO STRIKE ON OBJECTION THE THREE DOCUMENTS WE'RE TALKING ABOUT SO RECENTLY FILED?

MR. WOOLLEY: YES, PLEASE, YOUR HONOR.

TO ADDRESS THE INTERIM MEMORANDUM CONCERNING PANAMANIAN LAW. ON TUESDAY THE COURT SUGGESTED VERY STRONGLY THAT IT WAS GOING TO DISMISS MY CLIENT'S ABILITY TO DEFEND THIS CASE. I ADVISED THE COURT I WAS NOT AN EXPERT ON PANAMANIAN LAW. I HAD PREVIOUSLY REQUESTED INFORMATION AS TO PANAMANIAN LAW. I RECEIVED THE RESULTS OF THOSE INQUIRES ON SATURDAY BY FAX.

I CAME IN ON SUNDAY. I HAVE FILED THE PAPERS WITH YOU. THAT IS I'M AFRAID THE EARLIEST I COULD HAVE DONE IT. I WISH I COULD HAVE DONE IT EARLIER. THE INTERIM MEMORANDUM RE LAW COMES FROM THE PANAMANIAN LAW FIRM, MORGAN & MORGAN, AND IT STATES CATEGORICALLY THAT CHAR YIGH DOES CONTINUE TO HAVE THE STATUS OR THE CAPACITY TO APPEAR IN THIS CASE.

THE COURT: IT SEEMS COUNTER TO THE CONCESSIONS YOU [p. 16] CLEARLY MADE ON THE RECORD SOME TIME AGO.

MR. WOOLLEY: I DO NOT BELIEVE IT DOES, YOUR HONOR. AT FIRST I DID PREDICATE MY CONCESSIONS BY SAYING I WAS NOT A PANAMANIAN LAWYER.

THE COURT: BUT YOU MADE THE CONCESSIONS ANYWAY.

MR. WOOLLEY: I THINK WHAT I SAID, AND I BELIEVE THE RECORD WILL BEAR ME OUT, IS THAT CHAR YIGH ITSELF AS A CORPORATE ENTITY MAY

NO LONGER HAVE THE ABILITY TO APPEAR. BUT THE DIRECTORS –

THE COURT: WELL, WE'RE BACK WHERE WE WERE BEFORE. IF IT DOESN'T, THAT'S THE ONLY ENTITY WHICH HAS APPEARED AND HAS MADE THESE OBJECTIONS.

MR. WOOLLEY: YOUR HONOR, IF YOU WOULD PERMIT ME, THE DIRECTORS AS TRUSTEES IN THE NAME OF CHAR YIGH, WITHOUT HAVING TO APPEAR AS TRUSTEES THEMSELVES, ARE ABLE TO CONTINUE THE CASE IN THE NAME OF CHAR YIGH.

THE COURT: WE DON'T EVEN KNOW. THERE IS NO PROBATIVE EVIDENCE THAT THERE ARE ANY DIRECTORS LEFT. WE CERTAINLY DO NOT KNOW WHO THEY ARE OR THAT THEY HAVE DECIDED TO CONTINUE ON BEHALF OF YOUR CLIENT.

NO FURTHER DISCUSSION WILL BE NECESSARY. THE OBJECTION TO THE THREE DOCUMENTS FILED FRIDAY AFTERNOON AND THIS MORNING ARE SUSTAINED. THEY ARE STRICKEN. PLEASE LODGE ANY THAT HAVE BEEN FILED. ONE OF THEM IS MARKED "FILED," MR. CLERK, ALL THREE OF THEM ARE. WILL YOU STRIKE THE FILING. [p. 17] MARK THEM LODGED. THEY ARE FAR TOO LATE. THEIR RECEIPT AND CONSIDERATION AT THIS TIME IS NOT AUTHORIZED BY ANY COURT RULE OR PROCEDURE AND PREJUDICES THE OTHER SIDE.

* * *